



U.S. Citizenship
and Immigration
Services

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MAR 16 2015

Memorandum

TO: Asylum Office Directors and Deputy Directors
ABC/NACARA Coordinators
Quality Assurance and Training Asylum Officers
Asylum Officers

FROM: John Lafferty
Chief, Asylum Division

SUBJECT: Changes to the ABC/NACARA Procedures Manual and to the Suspension of Deportation and Special Rule Cancellation of Removal under NACARA Lesson Plan affecting the adjudication of *special rule cancellation* of removal within the jurisdiction of the Eighth and Ninth Circuit Courts of Appeals.

The purpose of this memorandum is to announce changes to the *ABC/NACARA Procedures Manual* and to the *Suspension of Deportation and Special Rule Cancellation of Removal under NACARA Lesson Plan* regarding the adjudication of Special Rule Cancellation of Removal requests to reflect the holding *Aragon-Salazar v. Eric H. Holder, Jr.* Attorney General, 769 F. 3d 699 (9th Cir. 2014) and *Cuadra v. Gonzalez*, 417 F.3d 947 (8th Cir. 2005).

Effective immediately, for applications for special rule cancellation of removal under NACARA 203 adjudicated within the jurisdiction of the Eighth and Ninth circuits, asylum officers must calculate the 7-year continuous physical presence (CPP) and good moral character (GMC) period from the date that the Form I-881 was filed, instead of the date of the adjudication. Although the statutory wording is similar concerning suspension of deportation¹, the Ninth Circuit decision specifically addresses CPP requirement for special rule cancellation.

Outside of the Eighth and Ninth circuits, asylum officers must continue to adjudicate special rule cancellation of removal by assessing CPP and GMC counting back 7 years from the date the application is adjudicated, pursuant to controlling Board of Immigration Appeals (BIA)

¹ 8 CFR 240.65 (Eligibility for Suspension of Deportation) and 240.66 (Eligibility for Special Rule Cancellation of Removal) have similar language: "7 years immediately preceding the date the application was filed".

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precedent: “An application for special rule cancellation of removal is a continuous one, so [that] an applicant can accrue physical presence until the issuance of a final administrative decision.”
In re: Viviana Garcia, 24 I&N Dec. 179 (BIA 2007).

Background

On March 3, 2009, an immigration judge denied Mr. Aragon-Salazar’s application for NACARA special rule cancellation of removal. The immigration judge found that although Mr. Aragon-Salazar had established hardship and CPP, he failed to satisfy the GMC requirement under section 203 of NACARA. The immigration judge’s finding of lack of GMC was based upon conflicting testimony provided by Mr. Aragon-Salazar during his asylum interview with USCIS and the testimony he provided during a merits hearing before the immigration court. The BIA affirmed the immigration judge’s decision to deny *special rule cancellation*, finding that the *special rule cancellation* of removal is a “continuing” application through removal proceedings. Thus, the applicant lacked the requisite 7-year period of GMC because he made false statements for the purpose of obtaining *special rule cancellation* of removal during the administrative process.

On October 2, 2014, the Ninth Circuit issued the aforementioned precedent decision overturning the BIA decision that denied *special rule cancellation* of removal. The Court held that the statutory language concerning *special rule cancellation*, “has been physically present in the United States for a continuous period of not less than 7 years immediately preceding the date of such application” unambiguously refers to the date the application was filed. As a matter of first impression the Court held that a *special rule cancellation* application is not a *continuing application*, meaning that the period to establish GMC (and CPP) falls strictly within the 7-year period immediately preceding the filing of Form I-881. Thus, the Court found that Mr. Aragon-Salazar’s misrepresentation fell outside of the 7-year period and therefore could not be taken into account when determining GMC for purposes of *special rule cancellation of removal*.

Procedure

Aragon-Salazar is binding legal precedent in the Ninth Circuit, covering the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and the territory of Guam and directly affecting the asylum offices in Chicago, Los Angeles and San Francisco.

Additionally, the asylum offices in Chicago and Houston are bound by a similar ruling. A few years earlier, the Eighth Circuit Court of Appeals issued an analogous opinion, which is binding precedent in the area covering the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota, therefore directly affecting the asylum offices in Chicago and Houston. *See Cuadra v. Gonzales*, 417 F. 3d 947, 951 (8th Cir. 2005).

The major effect of these decisions is that in the affected jurisdictions asylum officers must consider the requirements for CPP and GMC to be fulfilled 7 years from the date when Form I-881 is filed with USCIS. In these jurisdictions, the application is not considered a “continuing”

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application throughout the administrative process, therefore postponing the adjudication of a claim that may have been filed shy of the 7 years CPP or GMC no longer allows the applicant to accrue more time towards eligibility.

An application for *special rule cancellation* of removal by an applicant who has not accrued the requisite CPP nor satisfies GMC requirement at the time that the I-881 application was filed may be dismissed if the applicant requests to withdraw the application. See NACARA Procedures Manual at XVII.A: “Decision-making on the NACARA (I-881) Application”. Also, NACARA Procedures Manual Appendices at APPENDIX AZ(1) - “NACARA Dismissal Letter - Applicant Withdrew Application.” In the event of a withdrawal, the asylum office may issue a Notice to Appear (NTA) (code A-1), or not issue an NTA (code A-6). Not issuing an NTA to a NACARA applicant who withdraws the I-881 would enable that person to file a new I-881 with USCIS.

In the instance that the Form I-881 was filed prematurely and controlling legal precedent requires that the 7-year CPP and GMC be fulfilled from the date the I-881 was filed, Asylum Officers must inform the affected applicants of the option to withdraw the I-881 without the issuance of an NTA, enabling them to re-file when they have accrued the prescribed time. Should the applicant not withdraw the premature application, the asylum officer must proceed with the adjudication and refer the application to the immigration judge because the applicant does not meet the statutory eligibility requirement(s). Because the referral is a continuation of the original I-881 that was filed with USCIS, the immigration judge would be bound to issue a final denial unless proceedings are terminated or the immigration judge allows the applicant to withdraw the NACARA application.

The holdings in *Aragon-Salazar* and *Cuadra v. Gonzales* alter the way in which USCIS adjudicates cases in the Ninth and Eighth circuits if the applicant commits an act that would have previously affected CPP or GMC during the adjudication process. Both circuit courts have held that if a misrepresentation made to an asylum officer and/or to an immigration judge takes place after the applicant has filed Form I-881, then the misrepresentation may not be taken into consideration when assessing GMC.

In the affected jurisdictions, when the applicant establishes 7-year CPP/GMC at time of filing of Form I-881, but not when the application is adjudicated, the asylum officer should consider not granting the application as a matter of discretion and issuing a referral to the immigration judge on the ground that the applicant is ineligible for the benefit. In these circumstances, it is important to follow the Lesson Plan’s guidance at Section XI:

Once an applicant has been found to meet the basic eligibility criteria for suspension of deportation or *special rule cancellation* of removal, the asylum officer should consider all of the circumstances of the case to decide if the statutorily eligible applicant merits a favorable exercise of discretion.

The decision whether to exercise discretion to grant *suspension of deportation* or *special rule cancellation* of removal may not be arbitrary, irrational, or contrary to law. As with

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an asylum adjudication, once the applicant has been found eligible for relief, discretion should be exercised in favor of the applicant unless there are clearly defined reasons that support a referral.

In determining whether to exercise discretion in the applicant's favor, the officer must weigh all positive factors against any negative factors. The factors to be considered are often similar to those used when determining good moral character but sometimes may be different. For example, the fact that an applicant has a serious medical condition or has lived in the U.S. for a very long time and is integrated into the community are factors that weigh in favor of exercising discretion to grant but may say little about the applicant's character. In addition, the factors considered in determining discretion do not need to be within the 7-year good moral character period.

Asylum Division Officer Training Course: *Suspension of Deportation and Special Rule Cancellation of Removal under NACARA*, section XI: "Discretion."

Outside of the Ninth and Eighth circuits, if the applicant commits an act after the filing of Form I-881 that would disqualify him or her from establishing GMC, the asylum officer is bound to refer, as ineligible, the *special rule cancellation* application to immigration judge .

To recapitulate, for *special rule cancellation* cases adjudicated within the jurisdiction of the Eighth and Ninth circuits, the asylum officer must calculate the requisite period of CPP/GMC from the date that the application was filed. Derogatory evidence falling outside of the requisite period may be considered as a matter of discretion. Cases outside of the jurisdiction of the Eighth and Ninth circuits should continue to be adjudicated pursuant to BIA precedent.

It is important that asylum office directors in Chicago, Los Angeles, Houston and San Francisco inform the public, including through public meetings, not to file Form I-881 *special rule cancellation* applications prematurely.

Please direct questions to the Headquarters Asylum Division Operations Branch Chief or the Operations Branch Program Manager for NACARA.

Enclosed:

1. ABC/NACARA Procedures Manual: section XVI. PROCESSING AT CONCLUSION OF NACARA/ASYLUM INTERVIEW, E. Requests for Withdrawal of I-881; and
2. Suspension of Deportation and Special Rule Cancellation of Removal under NACARA – Asylum Division Officer Training Course: sec. VI. CONTINUOUS PHYSICAL PRESENCE.